Nos. 14-1418, 14-1453, 14-1505,
15-35, 15-105, 15-119 & 15-191

In The
Supreme Court of the United States

DAVID A. ZUBIK, et al.,

Petitioners,

v.

SYLVIA BURWELL, Secretary
of Health and Human Services, et al.,

Respondents.

**On Writs Of Certiorari To The
United States Courts Of Appeals For The
Third, Fifth, Tenth And D.C. Circuits**

BRIEF OF *AMICUS CURIAE* THE HONORABLE ROBERT C. "BOBBY" SCOTT IN SUPPORT OF THE RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Congressman Robert C. "Bobby" Scott was first elected to Congress in 1992 and served on the House Judiciary Committee from 1993 until 2014 during that committee's deliberation of a number of key religious liberty issues, including the Religious Freedom Restoration Acts of 1993 and 2000 ("RFRA"). As Ranking Member of the Subcommittee on the Constitution from 1997 to 1999, he also played a key role in highlighting civil rights concerns as Congress re-examined RFRA *after* the decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and during the consideration of the Religious Liberty Protection Act (H.R. 1691).

In 2015, Congressman Scott assumed the Ranking Member position of the House Education and the Workforce Committee. The Committee shares jurisdiction on matters related to the Affordable Care Act, as well as strengthening worker protections and defending the civil rights of workers. It is Congressman Scott's view that religious liberty and freedom should not abrogate the civil rights protections of workers.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *Amicus* or his counsel made a monetary contribution to this brief's preparation or submission. All parties have consented on the docket to the filing of *amicus curiae* briefs.

SUMMARY OF ARGUMENT

Religious freedom lies at the heart of United States history and tradition, and has nurtured not only extraordinary religious diversity but also a peaceful society in which everyone is protected from harm regardless of their beliefs. Religious liberty needs to be balanced with concerns for harm to others, and that was the assumption of the bipartisan support behind the Religious Freedom Restoration Act of 1993 ("RFRA"). After RFRA was found unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997), many members of Congress began to question whether RFRA was the balance between liberty and protection from harm they assumed in 1993. Their concerns were assuaged by RFRA's proponents' exegesis of the bill, which repeatedly assured them that RFRA would not trump civil rights laws and would not be a tool for employers to overcome employee anti-discrimination laws.

When RFRA is interpreted literally, without reference to this legislative history, it becomes a tool by which a court can insert its policy judgment for the legitimate policy decisions of the elected branches. *Amicus curiae* is concerned that this Court's interpretation in *Burwell v. Hobby Lobby*, 573 U.S. ___, 134 S. Ct. 2751 (2014), crosses this boundary line into a violation of the separation of powers. To rule in favor of Petitioners in this case would be a certain violation of the separation of powers, as the Court would be putting itself in the shoes of the elected branches in reaching permissive accommodation.

Petitioners are asking this Court to personalize a fair and generous religious accommodation, to consider only their beliefs, and not the beliefs or rights of their employees. That is not the RFRA interpretation that a bipartisan Congress supported in 1993 or permitted to pass in 2000. It is certainly not the history of religious tolerance and peaceful religious coexistence that is the hallmark of the United States.

ARGUMENT

Religious freedom is a cornerstone of American law and society, a right that was of great importance to the founding generation and protected by the First Amendment. The notion that religious liberty is important and valuable to the public good is an idea embedded in American society, but the framing generation also understood that there is such a thing as too much liberty. Religious liberty must have a limit, particularly when its effect is harm to others. This "no-harm principle" was a notion articulated by John Locke in the 17th century, widely shared by the framing generation in the 18th century, and entrenched in modern philosophy and law by John Stuart Mill. In essence, the principle is a firm rejection of individual (or institutional) autonomy from the laws that protect others from harm. While the government has no business interfering in our beliefs, it must legitimately protect us from others' potential harms. GOD VS. THE GAVEL: THE PERILS OF EXTREME

RELIGIOUS LIBERTY 278-313 (Cambridge Univ. Press 2014).

Indeed, the 1786 Virginia Statute for Establishing Religious Freedom, which served as a basis for the First Amendment, enshrined this very balance between the freedom of conscience and not diminishing the rights of others to the rights and protections of civil law:

> Be it enacted by the General Assembly, that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

Thomas Jefferson, *Virginia Statute of Religious Freedom, in Thomas Jefferson: Word for Word* 55-57 (Maureen Harrison & Steve Gilbert eds., 1993). It is the question of this very balance that is before the Court in the case at hand.

Despite religion's societal value, it has contributed to significant social ills as well, such as slavery, sexism, anti-miscegenation, child abuse, and segregation, to name a few. At the beginning of our nation's history, some of the most fundamental inequalities were justified by citing to religious beliefs. The Civil

Rights Act of 1964 was met with significant objection based on religion, and although such criticisms were ultimately rejected, resistance to the Act persisted even after its adoption. *See* Brief of Julian Bond et al., as *Amici Curiae* Supporting the Government at 10-27, *Sebelius v. Hobby Lobby Stores, sub. nom Burwell v. Hobby Lobby Stores*, 573 U.S. ___, 134 S. Ct. 2751 (2014) (No. 13-354).

The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1993) ("RFRA"), was a direct congressional response to the Supreme Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990). *Smith* was met with extreme criticism by religious entities and legal scholars alike, who cast the decision as a dramatic, unjustified departure from previous free exercise cases. Working with the characterization of *Smith*'s supposed ill effects on religious liberty as advanced by these religious groups and academics, Congress passed RFRA three years after *Smith* was decided. It did so on the premise that RFRA would "restore" prior free exercise doctrine, that is, the ordinary strict scrutiny test articulated by the Supreme Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963). There was no discussion or expectation that the Court's free exercise outcomes other than *Smith* would be altered by RFRA.

The Supreme Court majority's interpretation of RFRA in *Burwell v. Hobby Lobby*, 573 U.S. ___, 134 S. Ct. 2751 (2014), came as a surprise to many, including members of Congress who had supported

RFRA in the past. The statutory test had developed beyond what they believed RFRA was intended to accomplish and reneged on the promises RFRA's supporters had given that federal civil rights would not be undermined by RFRA.

This Court and others have rejected the assertion of religious beliefs as a justification for denying Americans full civil rights protection. For example, courts have rejected the claim that women should receive less compensation than men on the belief that men are the head of the house, the wife, and the family. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990). Similar invocations of religious beliefs related to race and sex have been struck down by the Court. *See Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (holding that the governmental interest in eliminating racial discrimination outweighed any burden on the religious beliefs of a university. Bob Jones University refused to admit African-American students engaged in interracial relationships on the premise that it believed the Bible forbade such relationships); *United States v. Virginia*, 518 U.S. 515 (1996) (finding no "exceedingly persuasive justification" for denying women admission to an all-male military school and holding that classifications on the basis of sex may never be used to perpetuate gender stereotypes and the legal, social, and economic inferiority of women).

Many members and advocacy groups, who actively worked for RFRA's passage, were surprised by the

court's decision in *Hobby Lobby*.[2] For others, *Hobby Lobby* affirmed the troubling implications of RFRA that began to emerge after its passage in 1993 and led to the unraveling of support for it in 1999 during consideration of H.R. 1691, 106th Cong. (1999), the "Religious Liberty Protection Act" or RLPA.[3] H.R. 1691 was intended to restore RFRA's applications to the states post-*Boerne* decision, which was subject to many objections and dissents in Congress. In *Boerne*, the Court held that Congress had exceeded its constitutional authority in part by applying RFRA to the

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[2] For example, Senator Charles Schumer, who introduced RFRA in 1993, responded to the *Hobby Lobby* decision that RFRA "was not intended to extend the same protection to for-profit corporations, whose very purpose is to profit from the open market." Kristina Peterson, *Supreme Court's* Hobby Lobby *Ruling Ignites Debate Over Religious-Freedom Law*, Wall St. J. (June 30, 2014) http://www.wsj.com/articles/supreme-courts-hobby-lobby-ruling-ignites-debate-over-religious-freedom-law-1404155510. Rep. Jerry Nadler stated: "When we passed RFRA in 1993, we sought to restore – not expand – protection for religion. We kept in place the core principle that religion does not excuse for-profit businesses from complying with our laws. Religious belief did not excuse restaurants or hotels from following our civil rights laws in the 1960s or an Amish employer from paying into the Social Security system in the 1980s." Press Release, Rep. Nadler, Supreme Court Ruling on *Hobby Lobby* Case is a Defeat for Women, Religious Liberty (June 30, 2014).

[3] It is worth noting that RLPA, H.R. 1691, was identical to RFRA in that they both advanced an extreme religious liberty test (imposing on the government the requirement of proving that all laws serve a "compelling interest" in the "least restrictive means"). The main difference is that H.R. 1691 relied on the Commerce Clause in the hopes of passing constitutional muster. As a result, the legislative history and the debate of its provisions are intertwined with the RFRA of 2000.

states absent a clear and persistent record of constitutional violations. In short, the "bipartisan" broad support for RFRA ended not long after this Court decided *Boerne* and members re-examined RFRA.

In the 105th Congress, Ranking Member Robert C. "Bobby" Scott of the Subcommittee on the Constitution of the House Judiciary Committee, noted, "Mr. Chairman, part of my concern about the constitutionality of this bill stems from some of the language in *Boerne*, where the Court expresses almost a hostility to this kind of legislation and gives me the idea that it won't take much for them to throw out the next one. And the language that I am referring to says . . . government's ability to enforce generally applicable prohibitions of socially harmful conduct cannot depend on measuring the effects of governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling, contradicts both constitutional tradition and common sense." *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution & H. Comm. on the Judiciary*, 105th Cong. at 65-66 (1998).

This *amicus* brief outlines some of the complicated legislative history of RFRA that is important to the Court's deliberation on the matter at hand. Further, the brief argues that the *Hobby Lobby* majority's interpretation of RFRA risks violating the separation

of powers, particularly if it is applied to the facts of this case.

I. RFRA's Legislative History Indicates Unraveling Support Amid Growing Concerns about the Breadth and Scope of Its Impact

When RFRA was first enacted in 1993, a bipartisan coalition supported the laudable concept of shoring up protections for "religious liberty." The statute's title claimed that it was simply "restoring" religious liberty cases to a familiar, prior era. *See Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the House Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102nd Cong. 326 (1992) (statement of Professor Douglas Laycock) ("RFRA makes the exception explicit rather than implicit, but the standard for satisfying the exception should not change."). The argument was made that the only result of enacting RFRA would be to overturn one case, *Employment Div. v. Smith*, 494 U.S. 872 (1990). *See* 136 Cong. Rec. S17330-31 (1990) (statement of Sen. Joe Biden) (goal of RFRA was to "restore the previous rule of law, which required the Government to justify restrictions on religious freedom").

Five months before RFRA was enacted in 1993, when this Court decided *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), the tension between RFRA and the Court's prior doctrine began to emerge. In that case, Professor

Douglas Laycock, representing the church, argued that the Court should apply an extreme version of strict scrutiny wherein the government must prove the law serves a compelling interest by the "least restrictive means." *See* Brief for Petitioner at 36, *Church of the Lukumi Babalu Aye v. City of Hileah*, 508 U.S. 520 (1993) (No. 91-948). The *Lukumi* decision did apply strict scrutiny, because the law at issue was not generally applicable. *Lukumi*, 508 U.S. at 545-46.

More importantly, the *Lukumi* opinion also affirmed the two-part holding in *Smith*: (1) laws that are neutral and generally applicable receive rationality review while, (2) laws that are not neutral or not generally applicable, are subject to ordinary strict scrutiny. *Lukumi*, 508 U.S. at 531 (stating that neutral, generally applicable laws are subject to low-level scrutiny but a law that is either not neutral or not generally applicable is subject to strict scrutiny, where the government must prove the law satisfies a compelling interest by narrowly tailored means).

While *Lukumi* was being litigated, RFRA was pending before its initial passage. RFRA purportedly "restored" prior case law in its very title, but in fact its language departs from both elements of the Court's free exercise doctrine summarized in *Smith* and *Lukumi*: RFRA (1) subjects neutral and generally applicable laws to extreme strict scrutiny (not rationality review) and (2) it subjects laws that are not neutral or not generally applicable to that same extreme standard (not ordinary strict scrutiny).

Lukumi involved a law that was not generally applicable, because it targeted a small religious group and therefore strict scrutiny was applied under the First Amendment. In addition, the Native American Church (the entity at issue in *Smith*) had obtained exemptions in many states and from the federal government, and, therefore, negated the very need for RFRA after *Smith*. Thus, the *Lukumi* case and the legislative response to *Smith* show that RFRA was an overreaction. *Lukumi*, 508 U.S. at 539.

The congressional record, unfortunately, is blank on this score between this Court's *Lukumi* decision and RFRA's passage a mere five months later. Departing from its plain intent, RFRA would become a revolution in free exercise, empowering some to overcome neutral, generally applicable laws across the federal spectrum, and would therefore lead to unpredictable results, like *Hobby Lobby*.

Although there appeared to be broad support for RFRA and the need to "return to past doctrine," there was a clear failure to fully imagine the path we are now on and the threat RFRA could pose to a sweeping, endless array of issues, *e.g.*, increasing the rights of some to discriminate in housing against the emerging fair housing laws. Thus, in the hearings leading up to its first enactment in 1993, examples of the need for hyper-strict scrutiny of generally applicable laws were scarce. This contributed to RFRA's invalidation. *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) ("RFRA's legislative record lacks examples of

modern instances of generally applicable laws passed because of religious bigotry.").

At the time of RFRA's passage in 1993, there was no inkling that RFRA would be wielded as a weapon to restrict access to contraception or to harm LGBTQ, women, or children. *Burwell v. Hobby Lobby*, 573 U.S. ___, 134 S. Ct. 2751 (2014); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015); *Miller v. Davis*, No. CV 15-44-DLB, 2015 WL 9461520 (E.D. Ky. Sept. 11, 2015); *Perez v. Paragon Contractors Corp.*, No. 2:13-CV-281 RJS, 2013 WL 4478070 (D. Utah Aug. 21, 2013).

Nor did anyone imagine it would be a pipeline for the legalization of drugs. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *First Church of Cannabis v. Indiana*, No. 49C01-1507-MI-022522 (Marion Co. Cir. Ct. filed Jul. 8, 2015).

In 1998 and 1999, after the Court's decision in *Boerne* striking down RFRA, Congress revisited RFRA-like legislation in an effort to find a constitutional basis to re-enact it. Tellingly, it is this history, and members' reconsideration of RFRA, during which many members' deep concerns about RFRA's broad scope and its impact on civil rights, along with other important government interests, began to emerge. In hearings in the 105th and 106th Congress on this legislation, it became clear that there was a question of the interplay between the tests of RFRA and a host

of governmental interests to prohibit discrimination, and protect child welfare and other interests. *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution & H. Comm. on the Judiciary*, 105th Cong. at 68-71 (1998).

As noted in Dissenting Views to the House Report filed on the never-enacted H.R. 1691 or RLPA:

> We believe that the Boerne decision also indicates that Congress may have violated separation of powers principles by enacting RFRA, an issue the Court will be forced to decide if RLPA is enacted . . . . We know from our brief experience with RFRA and with several state versions of that statute that some religious groups will use RLPA to attack state and local civil rights laws.

H.R. Rep. No. 106-219, at 36 (1999).

Yet, proponents of RFRA responded to such concerns about the impact on civil rights with assurances to counter those concerns:

> Very briefly about civil rights laws, I would emphasize again what is frequently lost sight of. RLPA is not a statute that by itself trumps any particular practice or statute. It simply says you have got to look at it again and see if the statute or practice meets these standards: Does it serve a very important government interest, and does it do so in a way least burdensome to religion? It invalidates no civil rights law or any other law. In

> that respect, it is much narrower than existing exemptions from civil rights laws that give carte blanche to religious institutions to engage in religious discrimination, which is a typical feature of civil rights laws. Many civil rights laws have broader provisions – apply that same standard to anything a religious institution does. RLPA is not that broad. It gives the government a chance to justify its regulation. As I say in detail in the testimony, there aren't any religious organizations of any significance, and I don't know of any altogether, that practice or encourage racial discrimination. There are very few, and here the picture is a little more cloudy with regard to sexual discrimination. Moreover, it is settled by case law, that outside the area of hiring ministers, the claims of sexual equality are going to prevail over religious exemptions. That is even for religious institutions, to say nothing of for-profit institutions. I don't know of a single for-profit institution that has ever raised a successful religious freedom claim as against a civil rights claim. We can go into later, if there are questions, about how it would apply to marital status discrimination and gay rights discrimination, but I would expect largely that same pattern would hold.

Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution & H. Comm. on the Judiciary, 105th Cong. 56 (1998) (statement of Marc Stern, Director, Legal Department, American Jewish Congress).

And yet another RLPA proponent and religious liberty expert assured members on questions involving employers:

> As the employer becomes larger, or the nature of the work becomes less integrated with religious mission, this balance of interests changes. Soon it becomes impossible for the employer to show a substantial burden on religious exercise, and the state's interest in regulation grows in direct proportion to the number of jobs at issue.

Religious Liberty: Hearing on Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure Before the H. Comm. on the Judiciary, 106th Cong. 153 (2000) (responses of Douglas Laycock to Questions from Senator Kennedy). This certainly does not line up with the court's determination in *Hobby Lobby*, offering RFRA protections to an employer operating six hundred stores and employing thousands of employees.

Foretelling where RFRA would land, the Dissenting Views from the House Judiciary Committee Report on RLPA concluded:

> By imposing an across-the-board strict scrutiny standard, RLPA will be used to attack state and local civil rights laws, child welfare laws and a host of other laws that may not be compelling but nonetheless serve important governmental functions. In the end, we find ourselves faced with a bill that even the *Sherbert* Court may have recognized as

> dangerous. As that Court expressed it, "Even when [ ] action is in accord with one's religious convictions, it is not totally free from legislative restrictions."

H.R. Rep. No. 106-219, at 38 (1999).

In the end, RLPA passed the House after the defeat of an amendment offered by Rep. Nadler, a RFRA supporter, to prevent harm to civil rights. But the vote was far from unanimous, showing the fracturing of support for a clean RFRA bill: 306 in favor, 118 in opposition, and 10 not voting. H.R. 1691. Clearly, the broad-based coalition of interests and support for RFRA from members unraveled. As a result of the civil rights concerns, the Senate never voted on RLPA but rather considered a narrower version, which re-enacted RFRA, but only as applied to federal law, and the Religious Land Use and Institutionalized Persons Act, S. 2869 106th Cong. (2000) (enacted); 146 Cong. Rec. S7774-01 (2000), ("RLUIPA"), which only applies to state laws involving land use and prisons.

As Senator Reid noted in his remarks on the Senate floor in support of the more limited legislation:

> While the companion measure [H.R. 1691] passed the House of Representatives overwhelmingly in July 1999, the legislation stalled in the Senate when legitimate concerns were raised that RLPA, as drafted,

> would supersede certain civil rights, particularly in areas relating to employment and housing. These concerns were most troubling to the gay and lesbian community. Discrimination based upon race, national origin, and to lesser certainty, gender, would have been protected, regardless of RLPA, because the courts have recognized that preventing such discrimination is a sufficient enough compelling government interest to overcome the strict scrutiny standard that RLPA would apply to religious exercise. Sexual orientation and disability discrimination, however, have not been afforded this high level of protection. Mr. President, as I was considering the merits of the Religious Liberty Protection Act, these concerns weighed heavily upon my mind. . . . As I stated earlier, protecting hard fought civil rights, including those which prohibit discrimination based upon sexual orientation, played an important role in my desire to pursue a more narrowly-tailored religious freedom measure. I am proud to have had the opportunity to work with Senators HATCH and KENNEDY to accomplish the worthwhile endeavor of protecting legitimate civil rights while at the same time protecting the free exercise of religion.

Religious Land Use and Institutionalized Persons Act of 2000, 146 Cong. Rec. S7774-01 (2000) (statement of Sen. Harry Reid).

To summarize, it was widely agreed that RFRA as applied to the federal civil rights laws should not

trump those laws. It was only on the basis of these assurances and understanding that led the concerned members to clear the way for the new RFRA and RLUIPA.

In a letter to Senator Hatch to support the narrower legislation, the Clinton Administration's Department of Justice noted the civil rights implications of RLPA, stating:

> In addition, apparently there has been some question about the potential effect of S. 2869 on State and local civil rights laws, such as fair housing laws. Although prior legislative proposals implicated civil rights laws in a way that concerned the Department, we believe S. 2869 cannot and should not be construed to require exemptions from such laws.

Id. at S7776 (letter from Robert Rabin, Assistant Attorney General to Sen. Hatch).

Today, the fears and misgivings on the scope of RFRA continue to grow. One only needs to look at the recent threatened state boycotts that garnered national attention over state legislative RFRAs in Arizona, Indiana, and Arkansas as indication of the controversy that the once broadly supported legislation enjoyed as a measure of the complicated tempest that is RFRA. Campbell Robertson & Richard Pérez-Peña, *Bills on 'Religious Freedom' Upset Capitols in Arkansas and Indiana*, N.Y. Times, March 31, 2015, http://www.nytimes.com/2015/04/01/us/religious-freedom-restoration-act-arkansas-indiana.html?_r=0. Note that

state action on RFRAs intensified leading up to and in response to the *Obergefell v. Hodges*, 578 U.S. ___, 135 S. Ct. 2584 (2015), case as a preemptive strike against an anticipated expanse of gay rights. As Congress abandoned re-enacting a RFRA applicable to the states in H.R. 1691 almost sixteen years ago, it has set the stage for the battle in the states over RFRAs even now.

There are some who have made the argument that Congress has taken a hand's-off approach to RFRA with no attempt to amend or modify its scope, implying that there have been no concerns or objections to its application or interpretation. This is not only an inaccurate assertion, but it also fails to recognize the deep concern by members who feel that legislation must now be crafted to deal with the misapplication of RFRA. For instance, the Equality Act of 2015 was recently introduced to explicitly prohibit discrimination based on sexual orientation and gender identity in hiring, employment, education, housing, credit, and public accommodation.[4] This landmark bi-partisan civil rights legislation specifically carves out RFRA to ensure that it does not apply to the bill's provisions recognizing that RFRA is a growing threat to the expansion of civil rights on the basis of sexual orientation and gender identity. Equality Act, H.R. 3185, 114th Cong. (2015).

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[4] This legislation enjoys bipartisan support and has 172 co-sponsors.

While *Hobby Lobby*, and potentially this case if Petitioners prevail, threatens to undermine the rights of female employees not to be discriminated against based on religion or gender, these threats to civil rights are only the first to emerge from RFRA's Pandora's Box when interpreted broadly and aggressively. In 1999, some House Judiciary Committee members warned, "If the *Smith* decision stands for anything, it stands for the Court's determination that an across-the-board strict scrutiny standard would work a substantial injustice to other important but not compelling government interests." H.R. Rep. No. 106-219 (1999-2000). Yet, even then, members could not have foreseen *Hobby Lobby* or the challenge at issue in this case as to whether the simple act of filling out a form constitutes an undue burden.

Due to the *Hobby Lobby* reasoning and if this Court were to rule in favor of Petitioners in this case along the same lines, the rights of female employees not to be discriminated against based on religion or gender will be severely undermined. Additionally, a decision in the Petitioners' favor interferes with Congressional intent and affirmation of the policy to extend contraception coverage to women as a key component of good health care policy, which was only arrived at after months-long deliberations, numerous hearings, and consultations with a wide spectrum of experts, including many health experts.

II. The *Hobby Lobby* Interpretation of RFRA Threatens the Separation of Powers by Delegating Lawmaking Power to the Unelected Judiciary

When the Court engages in constitutional analysis, the structure of the Constitution and the requirement of mutual respect for the other branches play a significant role in the Court's reasoning, overtly or sub silentio. *Nixon v. United States*, 506 U.S. 224, 240-43 (1993). The constitutional free exercise cases were routinely decided by this Court's deference to the hard policy judgments that Congress or the military or prison authorities needed to make, or, in other words, with a healthy humility for its institutional limitations when it comes to policymaking. This was true across a wide landscape of legal arenas. *See, e.g., Bowen v. Roy*, 476 U.S. 693, 700-01 (1986) (social security system); *Goldman v. Weinberger*, 475 U.S. 503, 507-10 (1986) (military uniform); *United States v. Lee*, 455 U.S. 252, 261 (1982) (social security tax system); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (child labor law); *Jacobson v. Massachusetts*, 197 U.S. 11, 27-31 (1905) (mandatory smallpox vaccination).

When the Court's free exercise jurisprudence was redirected by Congress into a federal statute, the Court's role in these cases changed from one of healthy deference and respect for its sister branches to a statutory interpretation divorced from the

Court's known shortcomings. The most serious constitutional mischief has arisen in this Court's interpretation of the "least restrictive means" test.

In *Hobby Lobby*, the Court majority was comfortable not identifying the government's "compelling interest" in the Affordable Care Act's contraception mandate as it applies to for-profit employers, 134 S. Ct. at 2803, but then concluded that the "least restrictive means" test granted it carte blanche to second-guess how Congress and the Executive had crafted a religious exemption. 134 S. Ct. at 2802.

A majority of the Court confidently concluded that a "least restrictive means" would be for the government itself to pay for women's contraception in circumstances where the for-profit employer would not due to religious reasons. 134 S. Ct. at 2780. This conclusion was not economically or politically feasible. It was plainly not an option that Congress could have or would have chosen. But the Court majority took RFRA's language as an opening to set public policy, and not to defer to legislative or executive judgment, or political reality. The failure of deference to the legislative process threatens the separation of powers.

This extraordinary grab for power was repeated in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), when this Court interpreted the same standard and, in the course of doing so, abandoned its previous wholesome deference to the executive branches operating the prison systems. *See, e.g., O'Lone v. Estate of Shabazz*,

482 U.S. 342 (1987). Instead, the Court lectured prison authorities on how long a beard must be to form a security threat. *Hobbs*, 135 S. Ct. at 866. This new tone is quite distinct from the Court's interpretation of the same provisions in *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005), where a unanimous Court warned lower courts to defer to prison officials on matters of safety and security.

Of the Court's prior cases, the *Hobby Lobby* reasoning regarding the "least restrictive means" hearkens back to the reasoning in *Lochner v. New York*, 198 U.S. 45 (1906), because in both cases the Court put itself in the position of invasively second-guessing public policy. As with *Lochner*, the RFRA interpretation starting in *Hobby Lobby* has the capacity to raise questions about the Court's legitimacy and authority.

The *Lochner* approach was deployed by the Court to block social reforms for the protection of rights for workers, and particularly women and children, *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding federal regulation of child labor unconstitutional), workers in hazardous working conditions, *Lochner*, 198 U.S. 45 (1905) (holding state regulation of work hours unconstitutional), and women's rights, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (holding minimum wage law for women unconstitutional); Glen E. Summers, Private Property Without *Lochner*: Toward a Takings Jurisprudence Uncorrupted by Substantive Due Process, 142 U. PA. L. REV. 837, 863-84 (1993) ("when the judiciary acts as a

'superlegislature' . . . it serves to destroy the deviate constitutional scheme of separation of powers, and, in so doing, to undermine the intrinsic value and integrity of the democratic process."); Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 94 (1985) (when choosing itself, "the court becomes vulnerable to a charge that it is acting as a legislature. The outcome, based on past experience, is to harm both the Court and the country.").

This Court eventually abandoned the *Lochner* approach as beyond its institutional competency. *United States v. Carolene Products Co.*, 304 U.S. 144, 147 (1938); *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 488 (1955); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937); *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

That institutional capacity has not changed since then, but the RFRA test of "compelling interest" and "least restrictive means" for laws that are neutral and generally applicable puts the courts in this untenable position where it is least capable.

Thus, by imposing super strict scrutiny on the government in cases involving neutral, generally applicable statutes, RFRA, at least as interpreted by this Court in *Hobby Lobby*, delegates lawmaking power to the courts and, therefore, violates the separation of powers. *See Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) ("we have long insisted that 'the integrity and maintenance of the system of

government ordained by the Constituted' mandate that congress generally cannot delegate its legislative power to another branch.") (citing *Field v. Clark*, 143 U.S. 649, 692 (1892)); *J.W. Hampton, Jr. v. United States*, 276 U.S. 394, 406 (1928) ("It is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch.").

The same constitutional error arises when religious entities like the Petitioners ask the courts to recraft and micromanage religious exemptions under the *Hobby Lobby* reasoning. This Court in *Smith* made clear that in our democratic process, the legislature is in the better and the traditional position to shape religious exemptions and held that the Constitution does not give the courts that same power. Yet, the *Hobby Lobby* majority reversed the appropriate role of the courts and legislature in this arena.

Members of Congress predicted this potential constitutional pitfall – particularly when civil rights are at stake – while considering RLPA, which was touted as a "fix" for the *Boerne* invalidation of RFRA. This is the other side of the separation of powers coin that forbids Congress from enacting legislation that is a constitutional amendment, as RFRA is. *Boerne v. Flores*, 521 U.S. 507, 516, 529, 536 (1997) ("Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.").

III. The Petitioner's Theory Would Result in a RFRA Interpretation Unconstitutional as Applied

The Petitioner in this case is making such an extreme claim that it potentially violates more than one constitutional prohibition.

This is not a case where RFRA is being used to attack a law with no exemption, but rather it is being deployed for the purpose of re-crafting the existing accommodation to the benefit of Petitioner's religious worldview. Nor should it be ignored that the Petitioners' request would inflict harm on female employees. This Court has never found that notifying the government of a need for religious accommodation is a substantial burden on religion. This was certainly not an argument ever raised or considered when either RFRA were enacted in 1993 or 2000.

This argument against notifying the government of a need for accommodation is, on its face and at its base, specious, as the vast majority of federal appellate courts have held. *Grace Schools v. Burwell*, 801 F.3d 788, 791 (7th Cir. 2015); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 216-26 (2d Cir. 2015); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1173-74 (10th Cir. 2015); *Michigan Catholic Conference v. Burwell*, 755 F.3d 372 (6th Cir. 2014); *East Texas Baptist Univ. v. Burwell*, 793 F.3d 449, 459 (5th Cir. 2015); *Geneva Coll. v. Sec'y United States Dep't of Health & Human Servs.*, 778 F.3d 422, 442 (3d Cir. 2015); *Priests for Life v. United*

States Dep't of Health & Human Servs., 772 F.3d 229, 256 (D.C. Cir. 2014). *But see Sharpe Holdings v. Burwell*, 801 F.3d 927 (8th Cir. 2015).

To hold to the contrary turns RFRA into a sword that believers can wield against the thousands of religious accommodations already in place in federal law – to make them more and more extreme by judicial fiat.

In *Smith*, this Court correctly recognized that practice-specific religious exemptions have a long history and that there is every reason to expect lawmakers to be willing to provide exemptions in the future. "Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby punished from the political process . . . It is [] not surprising that a number of States have made an exception to their drug laws for sacramental peyote use." *Smith*, 49 U.S. at 890. The permissive legislative accommodation approved in *Smith* (unlike the blunderbuss approach of RFRA), turns on the assumption that only the lawmakers can adequately consider how a particular exemption harms public policy or others, or does not.[5]

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[5] This argument applies whether the law is a result of the legislative process or executive enforcement of a complex legislative scheme wherein Congress has delegated enforcement and application of the law to the executive. *See, e.g., Whitman v. American Trucking Association*, 531 U.S. 457, 472 (2001) (rejecting nondelegation doctrine as between the legislative and executive branches). It is common for the executive branch to

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Lawmakers are in the position to make that call in the best interest of the public. The courts simply are not. Therefore, if this Court were to interpret RFRA as Petitioners demand, it would violate the separation of powers.

CONCLUSION

At the time of RFRA's passage in 1993, the broad-based coalition of its supporters sought only to enact a statute that restored what was perceived as the pre-*Smith* standard for religious liberty claims. It was certainly never intended to allow one group to use its religious exercise as a sword to usurp the rights of others. It should be noted that Congress rejected the notion that RFRA should be used in such a way when it failed to re-enact it as applied to the states, or RLPA, in 1999.

RFRA, as presented by the Petitioners' claim, does not reflect what its supporters intended at the

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recognize religious exemptions that were not already built into the original law. *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegtal*, 546 U.S. 418, 433 (2006) ("21 U.S.C. § 812(b)(1) applies equal measure to the mescaline in peyote, yet both the Executive and Congress itself decreed an exception from the Controlled Substances Act for Native American religious use of peyote."); Exemptions Based on Religious Dietary Laws, 9 C.F.R. § 381.111 (2016); Accommodations to Religious Observance and Practice, 41 C.F.R. § 381.11 (2016); 29 C.F.R. § 1605.2(c)(1) (2016).

time of enactment. Moreover, such an interpretation threatens to violate the separation of powers. Accordingly, *Amicus Curiae* respectfully requests this Court reject the extreme reading of RFRA proposed by Petitioners, which would have the immediate effect of curtailing the rights of female employees. Further, such a reading would open the door for RFRA, in the name of religious exercise, to inflict harm against third parties across a broad array of important issues. Therefore, I strongly urge the Court to instead interpret RFRA in light of its legislative history and the intent of its bipartisan supporters.

Respectfully submitted,

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